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ABSTRACT

Title IX of the Education Amendments of 1972 prohibits sex discrimination in all schools and education programs that receive federal funds. Sexual harassment of students is one form of sex discrimination barred by the law. Detailed guidance on Title IX, issued by the Office of Civil Rights of the Department of Education, the enforcement agency for Title IX, is intended to clear up any confusion. The "Introduction" lists key points set out in the guidance. Articles include: (1) "Questions and Answers about Title IX and Sexual Harassment"; (2) "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (U.S. Department of Education, Office of Civil Rights); (3) "Role of the School Counselor in Confronting Peer Sexual Harassment" (L. L. Rowell, M. C. McBride, J. Nelson-Leaf; reprinted from "The School Counselor."). (EMK)

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ED 424 546

SEXUAL HARASSMENT IN THE SCHOOLS

Background on Title IX of the Education Amendments of 1972 and Guidance Issued by the Office of Civil Rights

March 1997

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SEXUAL HARASSMENT IN THE SCHOOLS

Background on Title IX of the Education Amendments of 1972 and Guidance Issued by the Office of Civil Rights

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INTRODUCTION

Title IX of the Education Amendments of 1972 prohibits sex discrimination in all schools and education programs that receive federal funds. Sexual harassment of students is one form of sex discrimination barred by the law.

How sexual harassment is defined--and how schools are required to respond--has been a source of great confusion for many educators. To clear up the confusion, on March 13, 1997, the Office of Civil Rights of the Department of Education, the enforcement agency for Title IX, recently issued detailed guidance on Title IX and sexual harassment and the legal responsibilities of schools and school personnel.

Among the key points set out in the Guidance:

- Title IX ***does*** require schools to respond to sexual harassment of students not only by it's own personnel, but by other students and third parties in the school environment.

- Schools are only required to respond to the sexual harassment of a student by another student (or peer sexual harassment) when the conduct is ***"severe, persistent, or pervasive"*** and when the school has been given "notice" of the conduct.

- Notice of peer sexual harassment can be given by a student not only by making a formal complaint, but through ***any*** formal or informal communication with any school employee, including a counselor.

- When a student reports peer sexual harassment to a counselor or other school employee and requests confidentiality, the school is legally obligated to investigate the report. The identity of the student may be withheld, but the specifics of the student's allegation must be reported so that it can be investigated.

- In most instances, the Family Educational Rights and Privacy Act (FERPA) prohibits schools from informing the victim of peer sexual harassment of the disciplinary measures taken against a student who is found guilty of harassment.

- Schools in Texas, Louisiana, and Mississippi are subject to different, lower standards of liability for sexual harassment as a result of a series of rulings by the Fifth Circuit Court of Appeals, but may elect to follow the OCR Guidelines at their discretion.

QUESTIONS AND ANSWERS ABOUT TITLE IX AND SEXUAL HARASSMENT

What institutions are affected by Title IX?

Any educational institution that receives federal funds is covered by the law.

How is the law enforced?

The Office of Civil Rights (OCR) of the Department of Education is responsible for enforcing Title IX and is authorized to withhold federal funds from a school found in violation. Individuals may also file suit in federal court and collect damages from institutions that violate Title IX.

Are schools responsible for conduct that occurs outside school grounds?

In some cases, yes. Title IX covers all aspects of a school's operations, including a school bus and academic, extracurricular or other activities that may be sponsored by the school but that take place outside school grounds.

What is sexual harassment?

Quid pro Quo Harassment occurs when a school employee conditions a student's participation in a program or bases a decision on the student's participation on his or her submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Quid pro quo harassment is unlawful regardless of whether or not the student submits to the demands.

Hostile Environment Harassment occurs when sexually harassing conduct by an employee, another student, or by a third party is *"sufficiently severe, persistent, or pervasive"* that it limits a student's ability to participate in or benefit from an educational program or when it creates a "hostile or abusive sexual environment." The courts have held that conduct which creates a "hostile environment" includes demands for sexual favors, sexual advances, kissing, fondling, repeated requests for dates, sexually derogatory comments, sexually explicit jokes and graffiti, use of vulgar language, indecent exposure, and the display of pictures of nude persons. Students other than the specific target of sexual conduct may also be victims of "hostile environment" harassment. Witnessing the conduct may create a "hostile environment" for students present.

Is all physical contact prohibited?

No. Title IX's prohibition does not apply to "legitimate nonsexual touching or other nonsexual conduct." OCR cites as examples of permissible conduct a coach hugging a student who makes a goal or a teacher offering a consoling hug to an injured child.

Does gender matter?

No. Title IX prohibits harassment of both male and female students. Similarly, the gender of the harasser is also immaterial. Sexual harassment is unlawful regardless of the gender of either the perpetrator or the victim and includes harassment in which both parties are the same gender.

What about sexual orientation?

Since Title IX does not prohibit discrimination on the basis of sexual orientation, harassment that is focused on the sexual orientation of the victim is not prohibited unless it includes actions or language involving sexual conduct. Thus, ridiculing a student on the basis of his or her real or perceived sexual orientation, when it does not include sexually explicit language or actions, is not barred by Title IX. OCR notes, however, that some states, localities, and school districts have adopted policies prohibiting discrimination on the basis of sexual orientation.

Is a consensual relationship between a student and teacher harassment?

Yes, if it does not meet OCR's standards for determining whether the contact is consensual. Any sexual contact between a teacher and an elementary school student violates Title IX because the student is not legally able to grant consent. When sexual contact is with an older secondary school student, there is a "strong presumption" that the contact is non-consensual. In these cases, and in cases involving postsecondary students, determinations about student consent should include an examination of the degree of power or control that the employee has over the student and whether the student is legally or practically able to grant consent (i.e., a student with a mental disability).

Does one incident create a "hostile environment"?

Not necessarily. The conduct violates Title IX only if it is "severe, persistent, or pervasive". Determining whether conduct meets this test must be done on a case-by-case basis. The following factors should be considered:

- *The degree to which the conduct affected a student's education.* This may be reflected tangibly in lower grades or non-participation in an activity, but less tangible effects such as feelings of humiliation may also be involved.

- *The type, frequency, and duration of the conduct.* Generally, a "hostile environment" is created when the conduct is sustained and nontrivial. The more severe the behavior, the less need there is to show that it was repetitive. One incident, if sufficiently severe, can create an unlawful "hostile environment."

- *The identity, age of and relationship between the alleged harasser and the subject.* The greater the power or authority of the perpetrator over the subject, the more likely it is that the behavior will create a "hostile environment."

- *The number of individuals involved.* If the conduct is by a group and directed toward an individual, it may be more likely to create a "hostile environment" than if it had been performed by one individual. In cases of conduct by an individual directed towards a group, the reverse may be true.

- *The size of the school, location of the incidents, and the context in which they occurred.* If the school is small, fewer incidents may create a "hostile environment" than at a larger institution. Conduct is also more likely to create a "hostile environment" when it occurs in a physically restrictive (such as a school bus) or more intimate environment (such as a dormitory room).

- *Other incidents at the school.* A "hostile environment" may be created if there is a series of incidents at a school, involving different students, even if each incident, by itself, did not meet the "severe, persistent, or pervasive" test.

Are there circumstances in which sexually explicit language may not constitute harassment under Title IX?

Yes. The First Amendment guarantees the freedom of expression of all Americans, including students, and does apply to schools and educational programs and activities. Some vulgar language or discussions of sexual activity, while offensive to some students, may be protected by the First Amendment and therefore permissible under Title IX. However, if the language is directed at a particular student or group of students and intended to threaten or intimidate, OCR indicates that it is **not** protected by the First Amendment and is prohibited by Title IX.

If the principal or dean is unaware of the sexual harassment of a student *by a teacher or faculty member*, is the school in violation of Title IX?

Yes. If a school employee with authority over a student (such as a teacher) sexually harasses the student (through either quid pro quo or hostile environment harassment), the school is liable under Title IX, whether or not administrators knew about or had reason to know about the conduct. Investing an employee with authority makes the school responsible for how that authority is used.

If the harassment is by a *student or a third party*, is the school in violation?

Not necessarily. A school is only liable for peer or third party harassment if:

- the conduct created a "hostile environment" under the criteria outlined above;
- the school "has notice" of the harassment; and
- the school did not take "immediate and appropriate corrective action."

Title IX does not require schools to take responsibility for the actions of students or third parties. It only holds schools accountable for how they respond to these actions.

Who is a third party?

A third party is anyone who is in the school environment who is not under the direct control of the school. This could include a guest speaker, members of a rival athletic team, a parent or other relative, or others who are in the school environment but who have not been invested with authority by the school.

When does a school "have notice" of peer or third party sexual harassment?

A school is considered to have been given "notice" of harassment whenever it "knew, or in the exercise of reasonable care, should have known" of the behavior.

Notice is given any time a school employee witnesses sexually harassing behavior or is directly informed by any individual--whether a student, parent, or other party--about the behavior. ***Communications with a professional counselor by a student are considered "notice."***

Even if there is no direct observation or report of the behavior, a school will be considered to have been given "constructive notice" under some circumstances, such as when the behavior is pervasive, widely practiced, or well known to students and staff. Anonymous letters to the student newspaper or graffiti in public areas can be considered "constructive notice." The report or observation of one incident of harassment can also be considered "constructive notice" that other, similar but unreported incidents may have occurred. Any report of sexual harassment, OCR indicates, should trigger a "reasonably diligent inquiry" to determine whether similar events may have occurred.

What "immediate and corrective action" is the school required to take?

- The school must conduct a "prompt, thorough, and impartial" inquiry of the incident.
- If the school determines that harassment has occurred, it must take "reasonable, timely, age-appropriate, and effective corrective action." The extent of the action taken against the harasser should depend on the severity of the conduct involved.

Action should also be taken to repair damage done to the victim of the harassment. This could include, for example, reevaluating the student's coursework and assigning a different grade; offering tutoring services; or providing counseling services.

- The school must also seek to eliminate any "hostile environment" that may have been created by the incident. If other students witnessed the harassment, the school may need to provide special training, counseling or other interventions for these students.

- Finally, the school must act to prevent future harassment. This includes encouraging the harassed student to report any subsequent incidents and providing counseling or other interventions to the harasser.

What if a student reports sexual harassment to a counselor but insists that it be kept confidential?

Regardless of whether the student requests confidentiality, the disclosure to the counselor qualifies as "notice" to the school under Title IX, triggering the school's responsibility to take the "corrective action" outlined above.

If a student requests confidentiality, OCR indicates that the student should be encouraged to formally report the incident and made to understand that the failure to make a formal complaint may limit the extent to which the school can respond to the conduct. If the student continues to insist that his or her identity be withheld, the school should honor that request. It is still responsible, however, for investigating the incident and responding appropriately. An investigation may identify others who witnessed the conduct who are willing to come forward. Failing that, the school may not be able to take formal disciplinary action against the accused because he or she has a due process right to be informed of his or her accuser and the nature of the accusations. But the school may take other actions, such as providing training on harassment issues or other interventions to students and personnel of the school.

In summary, when a student reports sexual harassment to a counselor and requests confidentiality, the identity of the student may be kept confidential, but the allegation of harassment may not be. By confiding in the counselor, the student has given "notice" to the school of a possible violation of Title IX and the school is legally obligated to respond appropriately to that notice.

Can peer sexual harassment complaints be handled through regular student disciplinary procedures?

Yes, so long as they provide for a "prompt and equitable" resolution of the complaint.

Can mediation or other methods of conflict resolution be used to address complaints of peer sexual harassment?

In some cases, yes. Any mediation process, however, must include the involvement of a counselor, administrator or other school personnel. It is not permissible to advise the student to "work out the problem" with the other party on his or her own. The complainant's participation must also be voluntary; he or she has the right to have the complaint dealt with through formal disciplinary procedures and must be advised of this. OCR also indicates informal mediation is never appropriate in cases where sexual assault is alleged.

Does referring a complaint to the police for investigation fulfill the school's responsibility to take "corrective action"?

No. The legal standards for criminal conduct are different from the Title IX standards for sexual harassment. Even if the matter has been referred to the police, the school is still required to investigate, evaluate, and respond appropriately to the conduct.

Does the complaining student have a right to be informed of the disciplinary measures taken against another student found guilty of harassment?

Generally, no. The Family Educational Rights and Privacy Act (FERPA) prohibits the release of information about disciplinary action taken against a student if the information is included in the student's education record. The only exceptions are if:

- the student or parent/guardian consents to the release of the information;
- the information directly relates to another student (such as an order requiring the student not to have contact with the complainant); or
- the harassment involves a crime of violence or a sexual offense at a postsecondary institution.

In all other circumstances, information about the disciplinary action must be kept confidential.

How does the Guidance affect schools in Texas, Louisiana, and Mississippi?

The Fifth Circuit Court of Appeals, which has jurisdiction over Texas, Louisiana, and Mississippi, has issued rulings that offer sharply different interpretations of Title IX than those put forward by OCR.

In *Rowinsky v. Bryan Independent School District*, the Court held that a school is not required by Title IX to investigate and remedy cases of peer sexual harassment so long

as it treats reports of harassment from both sexes equally. In other words, if a school ignores complaints from both sexes, it is in compliance with Title IX.

In *Canutillo Independent School District v. Leija*, the Fifth Circuit ruled that a school was only liable under Title IX for incidents of sexual harassment that were reported to a school administrator. Reports to a classroom teacher, counselor, or other school employee were not sufficient to trigger liability under Title IX.

The Court further limited a school's liability for sexual harassment by its employees in *Rosa H. v. San Elizario Independent School District*. In that case, the court found that a school was only legally responsible for an employee's sexual misconduct if the school's chief administrator was aware of the employee's actions.

On these three issues, schools in Texas, Louisiana, and Mississippi are only legally required to follow the Fifth Circuit's more limited interpretation of the requirements of Title IX. OCR, however, emphasizes that schools in these states may still elect to follow the OCR interpretation and encourages them to do so because it represents "better practice."

federal register

Thursday
March 13, 1997

Part VII

Department of Education

Office of Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Notice

DEPARTMENT OF EDUCATION

Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties

ACTION: Final policy guidance.

SUMMARY: The Assistant Secretary for Civil Rights issues a final document entitled "Sexual Harassment Guidance" (Guidance). Sexual harassment of students is prohibited by Title IX of the Education Amendments of 1972 under the circumstances described in the Guidance. The Guidance provides educational institutions with information regarding the standards that are used by the Office for Civil Rights (OCR), and that institutions should use, to investigate and resolve allegations of sexual harassment of students engaged in by school employees, other students (peers), or third parties.

FOR FURTHER INFORMATION CONTACT: Howard I. Kallem. U.S. Department of Education, 600 Independence Avenue, S.W., Room 5412 Switzer Building, Washington, D.C. 20202–1174. Telephone (202) 205–9641. Internet address: Howard__Kallem@ed.gov For additional copies of this Guidance, individuals may call OCR's Customer Service Team at (202) 205–5413 or toll-free at 1–800–421–3481. Individuals who use a telecommunications device for the deaf (TDD) may call the Department's toll-free number, 1–800–421–3481, in conjunction with the phone company's TDD relay capabilities. This Guidance will also be available at OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/ocrpubs.html.

SUPPLEMENTARY INFORMATION:

Purpose of the Guidance

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance. Sexual harassment of students can be a form of discrimination prohibited by Title IX. The Office for Civil Rights has long recognized that sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX. OCR's policy and practice is consistent with the Congress' goal in enacting Title IX—the elimination of sex-based discrimination in federally assisted education programs. It is also consistent with United States Supreme Court precedent and well-established legal principles that have developed under Title IX, as well as under the related anti-discrimination provisions of Title VI and Title VII of the Civil Rights Act of 1964.

The elimination of sexual harassment of students in federally assisted educational programs is a high priority for OCR. Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.

The Guidance applies to students at every level of education. It provides information intended to enable school employees and officials to identify sexual harassment and to take steps to prevent its occurrence. In addition, the Guidance is intended to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students. The Guidance is important because school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs. The Guidance discusses factors to be considered in applying the standards and examples that are designed to illustrate how the standards may apply to particular situations. Overall, the Guidance illustrates that in addressing allegations of sexual harassment, the judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

In addition, it is clear from the Guidance that not all behavior with sexual connotations constitutes sexual harassment under Federal law. In order to give rise to a complaint under Title IX, sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment. For a one-time incident to rise to the level of harassment, it must be severe.

As illustrated in the Guidance, school personnel should consider the age and maturity of students when responding to allegations of sexual harassment. The Guidance explains that age is relevant in determining whether sexual harassment occurred in the first instance, as well as in determining the appropriate response by the school. For example, age is relevant in determining whether a student welcomed the conduct and in determining whether the conduct was severe, persistent, or pervasive. Age is a factor to be considered by school personnel when determining what type of education or training to provide to students in order to prevent sexual harassment from occurring.

Notably, during the time that the Guidance was available for public comment, several incidents involving young students occurred in public schools and were widely reported in the press. In one incident a school reportedly punished a six-year-old boy, under its sexual harassment policy, for kissing a female classmate on the cheek. These incidents provide a good example of how the Guidance can assist schools in formulating appropriate responses to conduct of this type. The factors in the Guidance confirm that a kiss on the cheek by a first grader does not constitute sexual harassment.

Consistent with the Guidance's reliance on school employees and officials to use their judgment and common sense, the Guidance offers school personnel flexibility in how to respond to sexual harassment. Commenters who read the Guidance as always requiring schools to punish alleged harassment under an explicit sexual harassment policy rather than by use of a general disciplinary or behavior code, even if the latter may provide more age-appropriate ways to handle those incidents, are incorrect. First, if inappropriate conduct does not rise to the level of harassment prohibited by Title IX, school employees or officials may rely entirely on their own judgment regarding how best to handle the situation.

Even if a school determines that a student's conduct is sexual harassment, the Guidance explicitly states that Title IX permits the use of a general student disciplinary procedure. The critical issue under Title IX is whether responsive action that a school could reasonably be expected to take is effective in ending the sexual harassment and in preventing its recurrence. If treating sexual harassment merely as inappropriate behavior is not effective in ending the harassment or in preventing it from escalating, schools must take additional steps to ensure that students know that the conduct is prohibited sex discrimination.

Process in Developing the Guidance

Because of the importance of eliminating sexual harassment in schools, and based on the requests of schools, teachers, parents, and other interested parties, OCR determined that it should provide to schools a

comprehensive discussion of the legal standards and related issues involved in resolving sexual harassment incidents. While this document reflects longstanding OCR policy and practice in this area, it also reflects extensive consultation with interested parties. Even before making documents available for formal comment, OCR held a series of meetings with groups representing students, teachers, school administrators, and researchers. In these discussions, OCR gained valuable information regarding the realities of sexual harassment in schools, as well as information regarding promising practices for identifying and preventing harassment. These insights and learning are reflected in the Guidance.

Issuance of the Guidance for Comment and the Format of the Final Guidance

On August 16, 1996, the Assistant Secretary for Civil Rights published a notice in the **Federal Register** (61 FR 42728) regarding the availability of a document entitled: "Sexual Harassment Guidance: Peer Sexual Harassment" (Peer Guidance) and inviting comments on the document. Subsequently, on October 4, 1996, the Assistant Secretary published in the **Federal Register** (61 FR 52172) a request for comments on a document entitled: "Sexual Harassment Guidance: Harassment of Students by School Employees" (Employee Guidance). Both notices stated that the guidance documents reflected longstanding OCR policy and practice and invited comments and recommendations regarding their clarity and completeness.

The most significant change in the format of the final document is that it combines the two separate guidance documents into one document that addresses sexual harassment of students by peers, school employees, or third parties. Commenters frequently stated that a combined document would be clearer and easier to use. OCR agrees. Thus, the term "Guidance" when used in this preamble refers to the combined document that incorporates both the Peer Guidance and the Employee Guidance.

Analysis of Comments and Changes

In response to the Assistant Secretary's invitations to comment, OCR received approximately 70 comments on the Peer Guidance and approximately 10 comments on the Employee Guidance. Many commenters stated that the guidance documents provided comprehensive, clear, and useful information to schools. For instance, one commenter stated that the Peer Guidance was "a godsend * * * in one convenient place [it provides] the clear implications of the statutes, regulations, and case law." Another commenter stated that the Guidance "will assist universities * * * in maintaining a harassment-free educational environment."

Commenters also provided many specific suggestions and examples regarding how the final Guidance could be more complete and clearer. Many of these suggested changes have been incorporated into the Guidance.

The preamble discusses recurring and significant recommendations regarding the clarity and completeness of the document. While the invitations to comment on the Peer Guidance and Employee Guidance did not request substantive comments regarding OCR's longstanding policy and practice in the area of sexual harassment, some commenters did provide these comments. In instances in which OCR could provide additional useful information to readers related to these comments, it has done so in the preamble. Comments are grouped by subject and are discussed in the following sections.

The Need for Additional Guidance

Comments: Many commenters agreed that a document combining the Peer Guidance and the Employee Guidance would provide more clarity to schools. Commenters disagreed, however, regarding whether, and what type of, additional information is needed to enhance schools' understanding of their legal obligations under Title IX. Some commenters asked for more detailed analysis regarding the applicable legal standards, including hard and fast rules for determining what is harassment and how a school should respond. Other commenters, by contrast, found OCR's guidance documents, including the extensive legal citations, to be too detailed and "legalistic." They expressed a need for a document that is simpler and more accessible to teachers, parents, school administrators, and others who need to know how to recognize, report, or respond to sexual harassment.

Discussion: As the Guidance makes clear, it is impossible to provide hard and fast rules applicable to all instances of sexual harassment. Instead, the Guidance provides factors to help schools make appropriate judgments.

In response to concerns for more analysis of the legal standards, OCR has provided additional examples in the Guidance to illustrate how the Title IX legal standards may apply in particular cases. It is important to remember that examples are just that; they do not cover all the types of situations that may arise. Moreover, they may not illustrate the only way to respond to sexual harassment of students because there is often no one right way to respond.

OCR also believes that there is a legitimate concern that school administrators, teachers, students, and parents need an accessible document to assist them in recognizing and appropriately responding to sexual harassment. Accordingly, OCR has developed, in addition to the final Guidance, a pamphlet for conveying basic information regarding parties' rights and responsibilities under Title IX. The pamphlet includes information from the Guidance that would be most useful to these groups as they confront issues of sexual harassment. Concurrent with the issuance of this Guidance, the pamphlet will be issued with copies available from all OCR offices and an electronic posting on OCR's web site. For a copy of the pamphlet, individuals may call OCR's Customer Service Team at (202) 205–5413 or toll-free 1–800–421–3481. Copies will also be available from all OCR enforcement offices, and the pamphlet will be posted on OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/ocrpubs.html.

Additional Guidance on the First Amendment

Comments: Many commenters asked OCR to provide additional guidance regarding the interplay of academic freedom and free speech rights with Title IX's prohibition of sexual harassment. Several of these commenters wanted OCR to announce hard and fast rules in this area, although commenters disagreed on what those rules should be. For instance, one commenter requested that OCR tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose. Another commenter, by contrast, wanted OCR to state that classroom speech simply can never be the basis for a sexual harassment complaint. Other commenters requested that OCR include specific examples regarding the application of free speech rights.

Discussion: As the documents published for comment indicated, the resolution of cases involving potential First Amendment issues is highly fact- and context-dependent. Thus, hard and fast rules are not appropriate.

However, in order to respond to concerns that schools need assistance in making these determinations, OCR has provided additional examples in the Guidance regarding the application of

the First Amendment principles discussed there.

Application of Guidance to Harassment by Third Parties

Comments: Several commenters stated that it was unclear whether the Guidance applies if a student alleges harassment by a third party, i.e., by someone who is not an employee or student at the school.

Discussion: The Guidance clarifies that the principles in the Guidance apply to situations in which, for example, a student alleges that harassment by a visiting professional speaker or members of a visiting athletic team created a sexually hostile environment. The Peer Guidance did, in fact, discuss the standards applicable to the latter situation in which students from another school harassed the school's students.

The applicable standards have not changed, but the final Guidance clarifies that the same standards also apply if adults who are not employees or agents of the school engage in harassment of students.

Application of Guidance to Harassment Based on Sexual Orientation

Comments: Several commenters indicated that, in light of OCR's stated policy that Title IX's prohibition against sexual harassment applies regardless of the sex of the harassed student or of the sex of the alleged harasser, the Guidance was confusing regarding the statement that Title IX does not apply to discrimination on the basis of sexual orientation.

Discussion: The Guidance has been clarified to indicate that if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian. If, for example, harassing conduct of a sexual nature is directed at gay or lesbian students, it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students. The Guidance provides examples to illustrate the difference between this type of conduct, which may be prohibited by Title IX, and conduct constituting discrimination on the basis of sexual orientation, which is not prohibited by Title IX. The Guidance also indicates that some State or local laws or other Federal authority may prohibit discrimination on the basis of sexual orientation.

The Effect on the Guidance of Conflicting Federal Court Decisions

Comments: Several commenters requested clarification of the standards to be applied to sexual harassment cases in States subject to the jurisdiction of the United States Court of Appeals for the Fifth Circuit, specifically in light of the Fifth Circuit's decision in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

Discussion: One beneficial result of the Guidance will be to provide courts with ready access to the standards used by the agency that has been given the authority by law to interpret and enforce Title IX. Courts generally benefit from and defer to the expertise of an agency with that authority.

Nevertheless, OCR recognizes that recent Fifth Circuit decisions add to schools' confusion regarding Title IX legal standards. In *Rowinsky*, the Fifth Circuit held that a school is not liable under Title IX even if it is on notice of peer sexual harassment and it ignores or fails to remedy it, unless it responds differently based on the sex of the alleged victim. Consistent with the vigorous dissent in *Rowinsky*, as well as with other Federal decisions contrary to the *Rowinsky* holding, OCR continues to believe that the *Rowinsky* decision was wrongly decided. In OCR's view, the holding in *Rowinsky* was based on a mistaken belief that the legal principle underpinning this aspect of the Guidance makes a school responsible for the actions of a harassing student, rather than for the school's own discrimination in failing to respond once it knows that the harassment is happening.

In two very recent decisions involving sexual harassment of students by school employees, the Fifth Circuit again applied Title IX law in a manner inconsistent with OCR's longstanding policy and practice. First, in *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393, 398–400 (5th Cir. 1996), the court held, again over a strong dissent and contrary to OCR policy, that a school district was not liable for the sexual molestation of a second grade student by one of her teachers because the student and her mother only reported the harassment to her homeroom teacher. The court determined that notice to the teacher was not notice to the school—notwithstanding that a school handbook instructed students and parents to report complaints to the child's primary or homeroom teacher.

Finally, in *Rosa H. v. San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (Feb. 17, 1997), the Fifth Circuit reversed a jury finding that a school district was liable under Title IX for a hostile environment created by the school's male karate instructor, who repeatedly initiated sexual intercourse with a fifteen-year-old female karate student, often during the school day. The court held that, while "there was no question that the student was subject to discrimination based on sex," a school is liable only in situations in which an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Several of the decisions discuss according "appreciable deference" to OCR's interpretation of Title IX in appropriate circumstances and contain other indications that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law, even if it is inconsistent with OCR policy. OCR will also participate where appropriate, and in conjunction with the Department of Justice, to shape the evolution of Title IX law in a manner consistent with the Guidance.

Inconsistent decisions do not prohibit schools in States in the Fifth Circuit from following the Guidance. Since the Guidance assists school in ensuring that students can learn in a safe and nondiscriminatory educational environment, it is the better practice for these schools to follow the Guidance. Indeed, in light of the evolving case law in the Fifth Circuit, following the Guidance may also be the safest way to ensure compliance with the requirements of Title IX. School personnel in States in the Fifth Circuit should also consider whether State, local, or other Federal authority affects their obligations in these areas.

Notice

Comments: Several commenters recommended that additional guidance be provided regarding the types of employees through which a school can receive notice of sexual harassment. Commenters disagreed, however, on who should be able to receive notice. For instance, some commenters stated that OCR should find that a school has received notice only if "managerial" employees, "designated" employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a

responsible employee for purposes of notice.

Discussion: The Guidance states that a school has actual notice of sexual harassment if an agent or responsible employee of the school receives notice. An exhaustive list of employees would be inappropriate, however, because whether an employee is an agent or responsible school employee, or whether it would be reasonable for a student to believe the employee is an agent or responsible employee, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student. Thus, the Guidance gives examples of the types of employees that can receive notice of harassment. In this regard, it is important for schools to recognize that the Guidance does not necessarily require that any employee who receives notice of the harassment also be responsible for taking appropriate steps to end the harassment or prevent its recurrence. An employee may be required only to report the harassment to other school officials who have the responsibility to take appropriate action.

OCR does not agree with those commenters who recommend that a school can receive notice only through managerial or designated employees. For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration.

Comments: Several commenters stated that constructive notice, or the "should have known" standard, puts schools in the untenable position of constantly monitoring students and employees to seek out potential harassers.

Discussion: Constructive notice is relevant only if a school's liability depends on notice and conduct has occurred that is sufficient to trigger the school's obligation to respond. As the examples in the Guidance indicate, constructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.

Remedying the Effects of Harassment on Students

Comments: Several commenters expressed concern regarding the Guidance's statement that schools may be required to pay for professional counseling and other services necessary to remedy the effects of harassment on students. Some comments indicated confusion over the circumstances under which the responsibility for those costs would exist and concern over the financial responsibility that would be created. Others stated that schools should not be liable for these costs if they have taken appropriate responsive action to eliminate the harassing environment, or if the harassers are non-employees.

Discussion: The final Guidance provides additional clarification regarding when a school may be required to remedy the effects on those who have been subject to harassment. For instance, if a teacher engages in *quid pro quo* harassment against a student, a school is liable under Title IX for the conduct and its effects. Thus, appropriate corrective action could include providing counseling services to the harassed student or paying other costs necessary to remedy the effects of the teacher's harassment. On the other hand, if a school's liability depends on its failure to take appropriate action after it receives notice of the harassment, e.g., in cases of peer harassment, the extent of a school's liability for remedying the effects of harassment will depend on the speed and efficacy of the school's response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have prevented if it had responded appropriately to the student's complaints, including, if appropriate, the provision of counseling services.

Confidentiality

Comments: Many commenters recommended additional clarification regarding how schools should respond if a harassed student requests that his or her name not be disclosed. Some commenters believe that, particularly in the elementary and secondary school arena, remedying harassment must be the school's first priority, even if that action results in a breach of a request for confidentiality. These commenters were concerned that, by honoring requests for confidentiality, schools would not be able to take effective action to remedy harassment. Other commenters believe that if requests for confidentiality are not honored, students may be discouraged from reporting harassment. These commenters, therefore, argue that declining to honor these requests would be less effective in preventing harassment than taking whatever steps are possible to remedy harassment, while maintaining a victim's confidentiality. Finally, some commenters were concerned that withholding the name of the victim of harassment would interfere with the due process rights of the accused.

Discussion: The Guidance strikes a balance regarding the issue of confidentiality: encouraging students to report harassment, even if students wish to maintain confidentiality, but not placing schools in an untenable position regarding their obligations to remedy and prevent further harassment, or making it impossible for an accused to adequately defend himself or herself. The Guidance encourages schools to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment. (The Guidance also notes that schools should consider whether the Family Educational Rights and Privacy Act (FERPA) would prohibit a school from disclosing information from a student's education record without the consent of the student alleging harassment.) In addition, OCR has provided clarification by describing factors schools should consider in making these determinations. These factors include the nature of the harassment, the age of the students involved, and the number of incidents and students involved. These factors also may be relevant in balancing a victim's need for confidentiality against the rights of an accused harasser.

The Guidance also has been clarified to acknowledge that, because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser. The Guidance informs schools that, in all cases, they should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out a thorough investigation.

FERPA

Comments: Several commenters stated that the Department should change its position that FERPA could prevent a school from informing a complainant of the sanction or discipline imposed on a student found guilty of harassment. Some commenters

argued that information regarding the outcome of a sexual harassment complaint is not an education record covered by FERPA. Other commenters argued alternatively that any information regarding the outcome of the proceedings is "related to" the complainant and, therefore, the information can be disclosed to him or her consistent with FERPA. In addition, some commenters asked for clarification that FERPA does not limit the due process rights of a teacher who is accused of harassment to be informed of the name of the student who has alleged harassment.

Discussion: As these comments indicate, the interplay of FERPA and Title IX raises complex and difficult issues. Regarding requests for clarification on the interplay of FERPA and the rights of an accused employee, the Guidance clarifies that the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

Regarding whether FERPA prohibits the disclosure of any disciplinary action taken against a student found guilty of harassment, it is the Department's current position that FERPA prohibits a school from releasing information to a complainant if that information is contained in the other student's education record unless— (1) the information directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. However, in light of the comments received on this issue, the Department has determined that its position regarding the application of FERPA to records and information related to sexual harassment needs further consideration. Accordingly, the section on "Notice of Outcome and FERPA" has been removed from the Guidance. Additional guidance on FERPA will be forthcoming.

Does Title IX Require Schools to Have a Sexual Harassment Policy

Comments: Several commenters requested additional clarity regarding whether Title IX requires schools to have a policy explicitly prohibiting sexual harassment or to have grievance procedures specifically intended to handle sexual harassment complaints, or both.

Discussion: Title IX requires a recipient of Federal funds to notify students and parents of elementary and secondary students of its policy against discrimination based on sex and have in place a prompt and equitable procedure for resolving sex discrimination complaints. Sexual harassment can be a form of sexual discrimination. The Guidance clearly states that, while a recipient's policy and procedure must meet all procedural requirements of Title IX and apply to sexual harassment, a school does not have to have a policy and procedure specifically addressing sexual harassment, as long as its non-discrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination. OCR has found that policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited sex discrimination, and that it will not be tolerated by the school. That awareness, in turn, can be a key element in preventing sexual harassment.

Dated: March 10, 1997.

Norma V. Cantú,

Assistant Secretary for Civil Rights.

Sexual Harassment Guidance: Harassment of Students [1] by School Employees, Other Students, or Third Parties

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Introduction

Under Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations, no individual may be discriminated against on the basis of sex in any education program or activity receiving Federal financial assistance.[2] Sexual harassment of students is a form of prohibited sex discrimination [3] under the circumstances described in the Guidance. The following types of conduct constitute sexual harassment:

Quid Pro Quo Harassment

A school employee [4] explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.[5] *Quid pro quo* harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

Hostile Environment Sexual Harassment

Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) [6] by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.[7]

Schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.[8] As outlined in this guidance, grievance procedures also provide schools with an excellent mechanism to be used in their efforts to prevent sexual harassment before it occurs.

Finally, if the alleged harassment involves issues of speech or expression, a school's obligations may be affected by the application of First Amendment principles.

These and other issues are discussed in more detail in the following paragraphs.

Applicability of Title IX

Title IX applies to all public and private educational institutions that receive Federal funds, including elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The Guidance uses the term "schools" to refer to all those institutions. The "education program or activity" of a school includes all of the school's operations.[9] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

It is important to recognize that Title IX's prohibition of sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.[10] Similarly, one student's demonstration of a sports maneuver or

technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

Title IX protects any "person" from sex discrimination; accordingly both male and female students are protected from sexual harassment engaged in by a school's employees, other students, or third parties.[11] Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.[12] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[13]

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[14] sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX. It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority.[15]

It is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX if it is sufficiently severe, persistent, or pervasive and directed at individuals because of their sex.[16] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. Although a comprehensive discussion of gender-based harassment is beyond the scope of this Guidance, in assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.[17]

Liability of a School for Sexual Harassment

Liability of a School for Sexual Harassment by its Employees

A school's liability for sexual harassment by its employees is determined by application of agency principles,[18] i.e., by principles governing the delegation of authority to or authorization of another person to act on one's behalf.

Accordingly, a school will always be liable for even one instance of *quid pro quo* harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue.[19] Under agency principles, if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee or agent.[20]

A school will also be liable for hostile environment sexual harassment by its employees,[21] i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment if the employee— (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority);[22] or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.[23] For example, a school will be liable if a teacher abuses his or her delegated authority over a student to create a hostile environment, such as if the teacher implicitly threatens to fail a student unless the student responds to his or her sexual advances, even though the teacher fails to carry out the threat.[24]

As this example illustrates, in many cases the line between *quid pro quo* and hostile environment discrimination will be blurred, and the employee's conduct may constitute both types of harassment. However, what is important is that the school is liable for that conduct under application of agency principles, regardless of whether it is labeled as *quid pro quo* or hostile environment harassment.

Whether other employees, such as a janitor or cafeteria worker, are in positions of authority in relation to students—or whether it would be reasonable for the student to believe the employees are, even if the employees are not (i.e., apparent authority)—will depend on factors such as the authority actually given to the employee[25] (e.g., in some elementary schools, a cafeteria worker may have authority to impose discipline) and the age of the student. For example, in some cases the younger a student is, the more likely it is that he or she will consider any adult employee to be in a position of authority.

Even in situations not involving (i) *quid pro quo* harassment, (ii) creation of a hostile environment through an employee's apparent authority, or (iii) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority, a school will be liable for sexual harassment of its students by its employees under the same standards applicable to peer and third party hostile environment sexual harassment, as discussed in the next section. That is, if the school fails to take immediate and appropriate steps to remedy known harassment, then the school will be liable under Title IX.[26] It is important to emphasize that under this standard of liability the school can avoid violating Title IX if it takes immediate and appropriate action upon notice of the harassment.

Liability of a School for Peer or Third Party Harassment[27]

In contrast to the variety of situations in which a school may be liable for sexual harassment by its employees, a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[28] (Each of these factors is discussed in detail in subsequent sections of the Guidance.) Under these circumstances, a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate

steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Sexually harassing conduct of third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic club) can also cause a sexually hostile environment in school programs or activities. For the same reason that a school will be liable under Title IX for a hostile environment caused by its students, a school will be liable if third parties sexually harass its students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[29] However, the type of appropriate steps the school should take will differ depending on the level of control the school has over the third party harasser.[30] This issue is discussed in "Recipient's Response."

Effect of Grievance Procedures on Liability

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[31] (These issues are discussed in the section on "Prompt and Equitable Grievance Procedures.") These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by Title IX. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Accordingly, in the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent, or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and thus failed to remedy it.[32] This is because, without a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied. Moreover, under the agency principles previously discussed, a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students.[33]

OCR Case Resolution

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether—(1) the school has a policy prohibiting sex discrimination under Title IX and effective Title IX grievance procedures;[34] (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and appropriate corrective action responsive to *quid pro quo* or hostile environment harassment. (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.") If the school has taken each of these steps, OCR will consider the case against the school resolved and take no further action other than monitoring compliance with any agreement between the school and OCR. This is true in cases in which the school was in violation of Title IX, as well as those in which there has been no violation of Title IX.[35]

Welcomeness

In order to be actionable as harassment, sexual conduct must be unwelcome. Conduct is unwelcome if the student did not request or invite it and "regarded the conduct as undesirable or offensive."[36] Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.[37] For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of sexually demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it.[38] Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.[39]

If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.

Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher's sexually harassing comments during class; however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged "consensual" sexual relationships between a school's adult employees and its students. If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption,[40] OCR will consider a number of factors in determining whether a school employee's sexual advances or other sexual conduct could be considered welcome.[41] In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.[42] The factors include:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student.
- Whether the student was legally or practically unable to consent to the sexual conduct in question. For

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example, a student's age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student's ability to do so.

If there is a dispute about whether harassment occurred or whether it was welcome—in a case in which it is appropriate to consider whether the conduct could be welcome—determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.
- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.
- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.
- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct, and his or her reaction to it, soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

Severe, Persistent, or Pervasive

Hostile environment sexual harassment of a student or students by other students, employees, or third parties is created if conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment. Thus, conduct that is sufficiently severe, but not persistent or pervasive, can result in hostile environment sexual harassment.

In deciding whether conduct is sufficiently severe, persistent, or pervasive, the conduct should be considered from both a subjective [43] and objective [44] perspective. In making this determination, all relevant circumstances should be considered [45]:

- *The degree to which the conduct affected one or more students' education.* For a hostile environment to exist, the conduct must have limited the ability of a student to participate in or benefit from his or her education or altered the conditions of the student's educational environment.[46]

•• Many hostile environment cases involve tangible or obvious injuries.[47] For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior.[48] A student may also suffer physical injuries and mental or emotional distress.[49]

•• However, a hostile environment may exist even if there is no tangible injury to the student.[50] For example, a student may have been able to keep up his or her grades and continue to attend school even though it was more difficult for him or her to do so because of the harassing behavior.[51] A student may be able to remain on a sports team, despite feeling humiliated or angered by harassment that creates a hostile environment.[52] Harassing conduct in these examples alters the student's educational environment on the basis of sex.

•• A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant.[53] For example, if a student or group of students regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct. Similarly, if a middle school teacher directs sexual comments toward a particular student, a hostile environment may be created for the targeted student and for the students who witness the conduct.

- *The type, frequency, and duration of the conduct.* In most cases, a hostile environment will exist if there is a pattern or practice of harassment or if the harassment is sustained and nontrivial.[54] For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student's breasts, genital area, or buttocks, it need not be as persistent or pervasive in order to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.[55] On the other hand, conduct that is not severe, persistent, or pervasive will not create a hostile environment; e.g., a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances, this may not even be conduct of a sexual nature.[56] Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person may request dates in an intimidating or threatening manner.
- *The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.* A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of and relationship between the alleged harasser and the subject or subjects of the harassment. For example, due to the power that a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.[57]
- *The number of individuals involved.* Sexual harassment may be committed by an individual or a group.

In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group,[58] the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be "safety in numbers." For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.

• *The age and sex of the alleged harasser and the subject or subjects of the harassment.* For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.[59]

• *The size of the school, location of the incidents, and context in which they occurred.* Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for the students to avoid their harassers.[60] Harassing conduct in a personal or secluded area such as a dormitory room or residence hall can also have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.

• *Other incidents at the school.* A series of instances at the school, not involving the same students, could—taken together—create a hostile environment, even if each by itself would not be sufficient.[61]

• *Incidents of gender-based, but non-sexual, harassment.* Acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently severe, persistent, or pervasive to create a sexually hostile environment.[62]

Notice

A school will be in violation of Title IX if the school "has notice" of a sexually hostile environment and fails to take immediate and appropriate corrective action.[63] A school has notice if it actually "knew, or in the exercise of reasonable care, should have known" about the harassment.[64] In addition, as long as an agent or responsible employee of the school received notice,[65] the school has notice.

A school can receive notice in many different ways. A student may have filed a grievance or complained to a teacher about fellow students sexually harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the school may have witnessed the harassment. The school may receive notice in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have received notice from flyers about the incident or incidents posted around the school.[66]

Constructive notice exists if the school "should have" known about the harassment—if the school would have found out about the harassment through a "reasonably diligent inquiry."[67] For example, if a school knows of some incidents of harassment, there may be situations in which it will be charged with notice of others—if the known incidents should have triggered an investigation that would have led to a discovery of the additional incidents. In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—if the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision).[68]

In addition, if a school otherwise has actual or constructive notice of a hostile environment and fails to take immediate and appropriate corrective action, a school has violated Title IX even if the student fails to use the school's existing grievance procedures.

Recipient's Response

Once a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.[69] As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

Response to Student or Parent Reports of Harassment; Response to Direct Observation by a Responsible Employee or Agent of Harassment

If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee or agent has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student),[70] explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible school employee or agent), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of the Guidance.)

It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to immediately place the students in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation.[71] Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.[72] A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.[73] In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements[74] or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate[75].

Steps also should be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student.[76] For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, this constitutes *quid pro quo* harassment for which the school is liable under Title IX regardless of whether it knew of the harassment. Thus, the school may be required to make arrangements for an independent reassessment of the student's work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and appropriately.

Finally, a school should take steps to prevent any further harassment[77] and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against a person who filed a complaint on behalf of a student, or against those who provided information as witnesses.[78] At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.[79]

Requests by the Harassed Student for Confidentiality

The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that the request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to try to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with that request as long as doing so does not preclude the school from responding effectively to the harassment and preventing harassment of other students. Thus, for example, a reasonable response would not require disciplinary action against an alleged harasser if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.[80]

Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the

complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible—including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX—the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

Response to Other Types of Notice

The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee or agent directly observes sexual harassment of a student. If a school learns of harassment through other means, for example if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school's response. These factors include the source and nature of the information; the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment; and whether those individuals want to pursue the matter. If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.

For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If, on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school's response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

Prevention

A policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school's attention so that the school can address it *before* it becomes sufficiently severe, persistent, or pervasive to create a hostile environment. Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond.

Prompt and Equitable Grievance Procedures

Schools are required by Title IX to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex.[81] Accordingly, regardless of whether harassment occurred, a school violates this requirement of Title IX if it does not have those procedures and policy in place.[82]

A school's sex discrimination grievance procedures must apply to complaints of sex discrimination in the school's education programs and activities filed by students against school employees, other students, or third parties.[83] Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that that conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective.[84]

OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for—

(1) Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;

(2) Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;

(3) Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

(4) Designated and reasonably prompt timeframes for the major stages of the complaint process;

(5) Notice to the parties of the outcome of the complaint;[85] and

(6) An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.[86]

Many schools also provide an opportunity to appeal the findings or remedy or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment. During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated. Distributing the procedures to administrators, or including them in the school's administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, parents of elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.

A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.[87] The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.[88] Because it is possible that an employee designated to handle Title IX complaints may him or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment.[89] While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them.[90] Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.[91]

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.[92] OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a "prompt and equitable" resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact-gathering. However, because legal standards for criminal conduct are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly.[93] Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.[94]

Finally, a public school's employees may have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to those accused of harassment. Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions. Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved.[95] Free speech rights apply in the classroom (e.g., classroom lectures and discussions)[96] and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events[97]; and student newspapers, journals and other publications[98]). In addition, First Amendment rights apply to the speech of students and teachers.[99]

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.[100] In order to establish a violation of Title IX, the harassment must be sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.[101]

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently severe, persistent, or pervasive as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a

school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistent with the First Amendment.[102] As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

Example 1: In a college level creative writing class, a professor's required reading list includes excerpts from literary classics that contain descriptions of explicit sexual conduct, including scenes that depict women in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

Answer: Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals. Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

Example 2: A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students' conduct has created a hostile environment for girls on the bus and that they fear for their daughter's safety. What must the school do in response?

Answer: Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take reasonable and appropriate actions against the students, including disciplinary action if necessary, to remedy the hostile environment and prevent future harassment.

Footnotes

1. This Guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. If employees bring sexual harassment claims under Title IX, case law applicable to sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a), and Equal Employment Opportunity Commission (EEOC) guidelines will apply. *See* 28 CFR 42.604 (Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance).

2. 20 U.S.C. 1681 *et seq.*, as amended; 34 CFR 106.1, 106.31(a)(b). In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the workplace developed under Title VII. *See Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (applying Title VII principles in determining that a student was entitled to protection from sexual harassment by a teacher in school under Title IX); *Kinman* v. *Omaha Public School Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (applying Title VII principles in determining that a student was entitled to protection from hostile environment sexual harassment by a teacher in school under Title IX); *Doe* v. *Claiborne County*, 1996 WL 734583, *19 (6th Cir. December 26, 1996) (holding in a case involving allegations of hostile environment sexual harassment of a student by a teacher that Title VII agency principles apply to sexual harassment cases brought under Title IX); *Murray* v. *New York University College of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995) (while finding notice lacking, court applied Title VII principles in assuming a Title IX cause of action for sexual harassment of a medical student by a patient visiting the school clinic); *Doe* v. *Petaluma City School Dist.*, 830 F.Supp. 1560, 1571–72 (N.D. Cal. 1993) (applying Title VII principles in determining that if school had notice of peer sexual harassment and failed to take appropriate corrective action, school liable under Title IX), *rev'd in part on other grounds*, 54 F.3d 1447 (9th Cir. 1995); *Kadiki* v. *Virginia Commonwealth University*, 892 F.Supp. 746, 749 (E.D. Va. 1995) (in Title IX case involving allegations of both *quid pro quo* and hostile environment sexual harassment, court indicated that Title VII standards should be applied).

In addition, many of the principles applicable to racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title VII also apply to sexual harassment under Title IX. Indeed, Title IX was modeled on Title VI, *Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979). For information on racial harassment, see the Department's Notice of Investigative Guidance for Racial Harassment, 59 FR 11448 (1994).

3. Consistent with Supreme Court decisions, *see Franklin*, 503 U.S. at 75 (expressly ruling that the sexual harassment of a student by a teacher violates Title IX), the Department has interpreted Title IX as prohibiting sexual harassment for over a decade. *Kinman*, 94 F.3d at 469 (Title IX prohibits hostile environment sexual harassment of student by teacher). Moreover, it has been OCR's longstanding practice to apply Title IX to peer harassment. *See also Bosley* v. *Kearney R–1 School Dist.*, 904 F.Supp. 1006, 1023 (W.D. Mo. 1995); *Doe* v. *Petaluma City School Dist., Plaintiff's Motion for Reconsideration Granted*, 1996 WL 432298 (N.D. Cal. July 22, 1996) (reaffirming Title IX liability for peer harassment if the school knows of the hostile environment but fails to take remedial action); *Burrow* v. *Postville Community School District*, 929 F.Supp. 1193, 1205 (N.D. Iowa 1996) (student may bring Title IX cause of action against a school for its knowing failure to take appropriate remedial action in response to the hostile environment created by students at the school); *Oona R.–S.* v. *Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D. Cal. 1995); *Davis* v. *Monroe County Bd. of Education*, 74 F.3d 1186, 1193 (11th Cir. 1996) (as Title VII is violated if a sexually hostile working environment is created by co-workers and tolerated by the employer, Title IX is violated if a sexually hostile educational environment is created by a fellow student or students and the supervising authorities knowingly failed to act to eliminate the harassment), *vacated, reh'g granted*, 91 F.3d 1418 (11th Cir. 1996); *cf. Murray*, 57 F.3d at 249 (while court finds no notice to school, assumes a Title IX cause of action for sexual harassment of a medical student by a patient visiting school clinic). *But see* note 27. Of course, OCR has interpreted Title IX as prohibiting *quid pro quo* harassment of students for many years. *See Alexander* v. *Yale University*, 459 F.Supp. 1, 4 (D.Conn. 1977), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

4. The term "employee" refers to employees and agents of a school. This includes persons with whom the school contracts to provide services for the school. *See Brown* v. *Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, while the standards applicable to peer sexual harassment are generally applicable to claims of student-on-student harassment, schools will be liable for the sexual harassment of one student by another student under the standards applicable to employee-on-student harassment if a student engages in sexual harassment as an agent or employee of a school. For instance, a school would be liable under the standards applicable to *quid pro quo* harassment if a student teaching assistant, who has been given the authority to assign grades, requires a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.

5. *Alexander*, 459 F.Supp. at 4 (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); *Kadiki*, 892 F.Supp. at 752 (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute *quid pro quo* harassment); *see also Karibian* v. *Columbia University*, 14 F.3d 773, 777–79 (2nd Cir. 1994) (Title VII case).

6. *See e.g., Franklin*, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX

included kissing, sexual intercourse); *Meritor Savings Bank FSB* v. *Vinson*, 477 U.S. 57, 60–61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape sufficient to raise hostile environment claim under Title VII); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993) (sexually derogatory comments and innuendo may support a sexual harassment claim under Title VII); *Ellison* v. *Brady*, 924 F.2d 872, 873–74, 880 (9th Cir. 1991) (allegations sufficient to state a sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff); *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 903–4 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); *Kadiki*, 892 F.Supp. at 751 (professor's spanking of a university student may constitute sexual conduct under Title IX); *Doe* v. *Petaluma*, 830 F.Supp. at 1564–65 (sexually derogatory taunts and innuendo can be the basis of a harassment claim); *Denver School Dist. #1*, OCR Case No. 08–92–1007 (same as to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); *Nashoba Regional High School*, OCR Case No. 01–92–1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student.)

7. *Davis*, 74 F.3d at 1194, *vacated; reh'g granted; Doe* v. *Petaluma*, 830 F.Supp. at 1571–73; *Moire* v. *Temple University School of Medicine*, 613 F.Supp. 1360, 1366 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986); *see also Vinson*, 477 U.S. at 67; *Lipsett*, 864 F.2d at 901; Racial Harassment Guidance, 59 FR 11449–50. *But see* note 27.

8. 34 CFR 106.8(b).

9. 20 U.S.C. 1687 (codification of Title IX portion of the Civil Rights Restoration Act of 1987).

10. *See also Shoreline School Dist.*, OCR Case No. 10–92–1002 (a teacher's patting student on arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); *Dartmouth Public Schools*, OCR Case No. 01–90–1058 (same as to contact between high school coach and students); *San Francisco State University*, OCR Case No. 09–94–2038 (same as to faculty advisor placing her arm around graduate student's shoulder in posing for a picture); *Analy Union High School Dist.*, OCR Case No. 09–92–1249 (same as to drama instructor who put his arms around both male and female students who confided in him.)

11. *Cf. John Does 1* v. *Covington County School Bd.*, 884 F.Supp. 462, 464–65 (M.D. Ala. 1995) (male students alleging that teacher sexually harassed and abused them stated cause of action under Title IX).

12. Title IX and the regulations implementing it prohibit discrimination "on the basis of sex;" they do not restrict sexual harassment to those circumstances in which the harasser only harasses members of the opposite sex in incidents involving either *quid pro quo* or hostile environment sexual harassment. *See* 34 CFR 106.31. In order for hostile environment harassment to be actionable under Title IX, it must create a hostile or abusive environment. This can occur when a student or employee harasses a member of the same sex. *See Kinman*, 94 F.3d at 468 (female student's alleging sexual harassment by female teacher sufficient to raise a claim under Title IX); *Doe* v. *Petaluma*, 830 F.Supp. at 1564–65, 1575 (female junior high school student alleging sexual harassment by other students, including both boys and girls, sufficient to raise claim under Title IX); *John Does 1*, 884 F.Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. *Chiapuzo* v. *BLT Operating Co.*, 826 F.Supp. 1334 (D. Wyo. 1993) (court found that such harassment could violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, for that matter, if a male student is repeatedly propositioned by a male student or employee). In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; e.g., pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in or affected the nature of the harasser's conduct or both. Thus, in *Chiapuzo*, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were gender-driven in that they were made with an intent to demean each member of the couple because of his or her respective sex. *See also Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1463–64 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 733 (1995) (Title VII case).

13. *Nashoba Regional High School*, OCR Case No. 01–92–1397. In *Conejo Valley School Dist.*, OCR Case No. 09–93–1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.

14. *Williamson* v. *A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989, *cert. denied* 493 U.S. 1089 (1990) (Title VII case); *DeSantis* v. *Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (same); *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (same).

15. *See Nabozny* v. *Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in case in which school district officials allegedly failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

16. *See Vinson*, 477 U.S. at 65–66; *Harris*, 114 S.Ct. at 370–371; *see also Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (Title VII case); *McKinney* v. *Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (Title VII case; physical, but non-sexual, assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex); *Cline* v. *General Electric Capital Auto Lease, Inc.*, 757 F.Supp. 923 (N.D. Ill. 1991) (Title VII case).

17. *See Harris*, 114 S.Ct. at 370–371; *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1485–86 (3rd Cir. 1990) (Title VII case; court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); *see also Hall* v. *Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (Title VII case); *Hicks*, 833 F.2d at 1415; *Eden Prairie Schools, Dist. #272*, OCR Case No. 05–92–1174 (the boys made lewd comments about male anatomy *and* tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls.

18. The Supreme Court has ruled that agency principles apply in determining an employer's liability under Title VII for the harassment of its employees by supervisors. *See Vinson*, 477 U.S. at 72. These principles would govern in Title IX cases involving employees who are harassed by their supervisors. *See* 28 CFR 42.604 (regulations providing for handling employment discrimination complaints by Federal agencies; requiring agencies to apply Title VII law if applicable). These same principles should govern the liability of educational institutions under Title IX for the harassment of students by teachers and other school employees in positions of authority. *See Franklin*, 503 U.S. at 75.

19. The Supreme Court in *Vinson* did not alter the standard developed in the lower Federal courts whereby an institution is absolutely liable for *quid pro quo* sexual harassment whether or not it knew, should have known, or approved of the harassment at issue. 477 U.S. at 70–71; *see also Lipsett*, 864 F.2d at 901; EEOC Notice N–915–050, March 1990, Policy Guidance on Current Issues of Sexual Harassment, at p. 21. This standard applies in the school context as well. *Kadiki*, 892 F.Supp. at 752 (for the purposes of *quid pro quo* harassment of a student, professor is in similar position as workplace supervisor).

20. *Kadiki*, 892 F.Supp. at 754–755; *cf. Martin* v. *Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995) (Title VII case); *Karibian*, 14 F.3d at 777–78; *Henson* v. *City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (Title VII case).

21. *See* note 4.

22. Restatement (Second) Agency § 219(2)(d); *Martin*, 48 F.3d at 1352 (finding an employer liable under Title VII for sexual harassment of an employee in case in which the Manager used his apparent authority to commit the harassment; the Manager was delegated full authority to hire, fire, promote, and discipline employees and used the authority to accomplish the harassment; and company policy required employees to report harassment to the Manager with no other grievance process made available to them).

23. *See* Restatement (Second) of Agency § 219(2)(d); EEOC Policy Guidance on Current Issues of Sexual Harassment at p. 28; *Karibian*, 14 F.3d at 780; *Hirschfeld* v. *New Mexico Corrections Dept.*, 916 F.2d 572, 579 (10th Cir. 1990) (Title VII case); *Martin*, 48 F.3d at 1352. *But see Rosa H* v. *San Elizario Ind. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997). In *San Elizario* the Fifth Circuit reversed a jury finding that a school district was liable under Title IX for a hostile environment created by the school's male karate instructor, who repeatedly initiated sexual intercourse with a fifteen-year-old female karate student. The court held, contrary to OCR policy, that a school could not be found liable under Title IX pursuant to agency principles.

However, language in this and previous decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. In light of the evolving case law in the Fifth Circuit, adhering to the standards in the Guidance may be the best way for schools in these States to ensure compliance with the requirements of Title IX. School personnel should also consider whether State, local, or other Federal authority affects their obligations in these areas.

24. *Karibian*, 14 F.3d at 780 (employer would be liable for hostile environment harassment in case in which allegations were that a supervisor coerced employee into a sexual relationship by, among other things, telling her she "'owed him' for all he was doing for her as her supervisor"); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558–60 (11th Cir. 1987) (Title VII case holding employer liable for sexually hostile environment created by supervisor who repeatedly reminded the harassed employee that he could fire her if she did not comply with his sexual advances).

25. *Cf. Karibian*, 14 F.3d at 780.

26. *Id.*

27. The overwhelming majority of courts that have considered the issue of sexually hostile environments caused by peers have indicated that schools may be liable under Title IX for their knowing failure to take appropriate actions to remedy the hostile environment. *See* note 7 and peer hostile environment cases cited in note 3. However, one Federal Circuit Court of Appeals decision, *Rowinsky* v. *Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996), has held to the contrary. In that case, over a strong dissent, the court rejected the authority of other Federal courts and OCR's longstanding construction of Title IX and held that a school district is not liable under Title IX for peer harassment unless "the school district itself directly discriminated based on sex," i.e., the school responded differently to sexual harassment or similar claims of girls versus boys. For cases specifically rejecting the *Rowinsky* interpretation, *see e.g., Doe* v. *Petaluma, Plaintiff's Motion for Reconsideration Granted*, 1996 WL 432298 *6 (N.D. Cal. 1996); *Burrow* v. *Postville Community School Dist.*, 929 F.Supp. at 1193.

OCR believes that the *Rowinsky* decision misinterprets Title IX. As explained in this Guidance, Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to take immediate and appropriate steps to remedy the hostile environment once a school official knows about it. If a student is sexually harassed by a fellow student, and a school official knows about it, but does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination. Notably, Title VII cases that hold that employers are responsible for remedying hostile environment harassment of one worker by a co-worker apply this same standard. *See, e.g., Ellison* v. *Brady*, 924 F.2d at 881–82; *Hall* v. *Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986); *Snell v. Suffolk*, 782 F.2d 1094 (2nd Cir. 1986); *Robinson* v. *Jacksonville Shipyards*, 760 F.Supp. 1486 (M.D. Fla. 1991).

Language in subsequent decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. However, the existence of Fifth Circuit decisions that are inconsistent with OCR policy does not prohibit schools in these States from following the Guidance. In order to ensure students a safe and nondiscriminatory educational environment, the better practice is for these schools to follow the Guidance. Thus, schools should take prompt corrective action to address peer harassment of which they knew or should have known. Indeed, following the Guidance may be the safest way for schools in these States to ensure compliance with the requirements of Title IX.

28. *See* Restatement (Second) of Agency § 219(2)(b).

29. As with peer harassment by its own students, a school's liability for the harassment of its students by third parties is based on its obligation to provide an environment free of discrimination. *Murray*, 57 F.3d at 250 (student participating in university dental clinic providing services to the public alleged harassment by a patient; while the court ruled in defendant's favor because of lack of notice, it considered such a claim actionable under Title IX); Racial Harassment Investigative Guidance, 59 FR 11450 (referring to harassment by neighborhood teenagers, guest speaker, and parents). *See, e.g.*, 29 CFR 1604.11(e); *Sparks* v. *Regional Medical Ctr.*, 792 F.Supp. 735, 738 n.1 (N.D. Ala. 1992) (Title VII case); *Powell* v. Las Vegas Hilton Corp., 841 F.Supp. 1024, 1027–28 (D. Nev. 1992) (Title VII case); *Magnuson* v. *Peak Technical Servs., Inc.*, 808 F.Supp. 500, 512–13 (E.D. Va. 1992) (Title VII case); *EEOC* v. *Sage Realty Corp.*, 507 F.Supp. 599, 611 (S.D.N.Y. 1981) (Title VII case); *cf. Dornhecker* v. *Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987) (assuming Title VII required employer to respond appropriately to sexual harassment of an employee by a contractor, but finding employer's response sufficient). *See also* Restatement (Second) of Agency § 219(2)(b).

30. For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. *Cf. Danna* v. *New York Telephone Co.*, 752 F.Supp. 594, 611 (S.D.N.Y. 1990) (telephone company in violation of Title VII for not taking sufficient action to protect its own employee from sexually explicit graffiti at the airport where she was assigned to work, e.g., contacting airport management to see what remedial measures could be taken).

31. 34 CFR 106.8(b) and 106.9.

32. *See* Racial Harassment Investigative Guidance, 59 FR 11450; *Murray*, 57 F.3d at 249 (an employer is liable for the harassment of co-workers if the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it".

33. EEOC Policy Guidance at p. 25 ("* * * in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.")

34. 34 CFR 106.8(b).

35. If OCR finds a violation of Title IX, it will seek to obtain an agreement with the school to voluntarily correct the violation. The agreement will set out the specific steps the school will take and provide for monitoring by OCR to ensure that the school complies with the agreement. Schools should note that the Supreme Court has held that monetary damages are available as a remedy in private lawsuits brought to redress violations of Title IX. *Franklin*, 503 U.S. at 76. Of course, a school's immediate and appropriate remedial actions are relevant in determining the nature and extent of the damages suffered by a plaintiff.

36. *Henson*, 682 F.2d at 903 (Title VII case).

37. [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII * * *. The correct inquiry is whether [the

subject of the harassment) by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. *Vinson*, 477 U.S. at 68.

38. *Lipsett*, 864 F.2d at 898 (while, in some instances, a person may have responsibility for telling the harasser directly that the conduct is unwelcome, in other cases a "consistent failure to respond to suggestive comments or gestures may be sufficient * * *."); *Danna*, 752 F.Supp. at 812 (despite female employee's own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); *see also Carr* v. *Allison Gas Turbine Div., GMC*, 32 F.3d 1007, 1011 (7th Cir. 1994) (Title VII case; cursing and dirty jokes by female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: "Even if * * * [the employee's] testimony that she talked and acted as she did [only] in an effort to be one of the boys is * * * discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct * * *. The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms * * * could not be deeply threatening.").

39. *Reed* v. *Shepard*, 939 F.2d 484, 486–87, 491–92 (7th Cir. 1991) (no harassment found under Title VII in case in which female employee not only tolerated, but also participated in and instigated the suggestive joking activities about which she was now complaining); *Weinsheimer* v. *Rockwell Int'l Corp.*, 794 F.Supp. 1559, 1563–64 (M.D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere). However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

40. The school bears the burden of rebutting the presumption.

41. Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees.

42. *See* note 41.

43. In *Harris*, the Supreme Court explained the requirement for considering the "subjective perspective" when determining the existence of a hostile environment. The Court stated: "* * * if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." 114 S.Ct. at 370.

44. The Supreme Court used a "reasonable person" standard in *Harris*, 114 S.Ct. at 370–71 to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account the sex of the subject of the harassment, *see, e.g., Ellison*, 924 F.2d at 878–79 (applying a "reasonable women" standard to sexual harassment), and has been adapted to sexual harassment in education. *Davis*, 74 F.3d at 1126 (relying on *Harris* to adopt an objective, reasonable person standard), *vacated, reh'g granted*; *Patricia H.* v. *Berkeley Unified School Dist.*, 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a "reasonable victim" standard and referring to OCR's use of it); Racial Harassment Guidance, 59 FR 11452 (the standard must take into account the characteristics and circumstances of victims on a case-by-case basis, particularly the victim's race and age).

45. *Harris*, 114 S.Ct. at 371; *See* Racial Harassment Guidance, 59 FR 11449 and 11452; *Brock* v. *United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (Title VII case); *Simon* v. *Morehouse Sch. of Medicine*, 908 F.Supp. 959, 969–970 (N.D. Ga. 1995) (Title VII case); *Al-Dabbagh* v. *Greenpeace, Inc.*, 873 F.Supp. 1105, 1111–12 (N.D. Ill. 1994) (Title VII case); *Watts* v. *N.Y.C. Police Dept.*, 724 F.Supp. 99, 104 (S.D.N.Y. 1989) (Title VII case).

46. *Davis*, 74 F.3d at 1126 (no Title IX violation unless the conduct has "actually altered the conditions of [the student's] learning environment"), *vacated, reh'g granted*; *Lipsett*, 864 F.2d at 898 (" altered" the educational environment); *Patricia H.*, 830 F. Supp. at 1297 (sexual harassment could be found where conduct interfered with student's ability to learn); *see also Andrews*, 895 F.2d at 1482 (Title VII case).

47. *Harris*, 114 S.Ct. at 371.

48. *See e.g., Doe* v *Petaluma*, 830 F. Supp at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school); *Modesto City Schools*, OCR Case No. 09–93–1391 (evidence showed that one girl's grades dropped while the harassment was occurring); *Weaverville Elementary School*, OCR Case No. 09–91–1116 (students left school due to the harassment). *Compare with College of Alameda*, OCR Case No. 09–90–2104 (student not in instructor's class and *no* evidence of any effect on student's educational benefits or services, so no hostile environment).

49. *Doe* v. *Petaluma*, 830 F. Supp. at 1566.

50. *See Harris*, 114 S.Ct. at 371, in which the Court held that tangible harm is not required. In determining whether harm is sufficient, several factors are to be considered, including frequency, severity, whether the conduct was threatening or humiliating versus a mere offensive utterance, and whether it unreasonably interfered with work performance. No single factor is required; similarly, psychological harm, while relevant, is not required.

51. *See Modesto City Schools*, OCR Case No. 09–93–1391 (evidence showed that several girls were afraid to go to school because of the harassment).

52. *Summerfield Schools*, OCR Case No. 15–92–1029.

53. *See Waltman* v. *Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (Title VII case); *see also Hall*, 842 F.2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII); Racial Harassment Investigative Guidance, 59 FR 11453.

54. *See, e.g., Andrews*, 895 F.2d at 1484 ("Harassment is pervasive when 'incidents of harassment occur either in concert or with regularity'."); *Moylan* v. *Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (Title VII case); *Downes* v. *Federal Aviation Administration*, 775 F.2d 288, 293 (D.C. Cir. 1985) (same); *cf. Scott* v. *Sears, Roebuck and Co.*, 798 F.2d 210, 214 (7th Cir. 1986) (Title VII case; conduct was not pervasive or debilitating).

55. The U.S. Equal Employment Opportunity Commission (EEOC) has stated: "The Commission will presume that the unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." EEOC Policy Guidance on Current Issues of Sexual Harassment, p. 17. *See also Barrett* v. *Omaha National Bank*, 584 F. Supp. 22, 30 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) (hostile environment created under Title VII by isolated events, i.e., occurring while traveling to and during a two-day conference, including the co-worker's talking to plaintiff about sexual activities and touching her in offensive manner while they were inside a vehicle from which she could not escape).

56. *See also Ursuline College*, OCR Case No. 05–91–2068 (A single incident of comments on a male student's muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment).

57. *Patricia H.*, 830 F.Supp. at 1297 ("grave disparity in age and power" between teacher and student contributed to the creation of a hostile environment); *Summerfield Schools*, OCR Case No. 15–92–1929 ("impact of the * * * remarks was heightened by the fact that the coach is an adult in a position of authority"); *cf. Doe* v. *Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 70 (1994) (Sec. 1983 case; in finding that a sexual relationship between a high school teacher and a student was unlawful, court considered the influence that the teacher had over the student by virtue of his position of authority).

58. *See, e.g., McKinney*, 765 F.2d at 1138–40; *Robinson*, 760 F. Supp. at 1522.

59. *Cf. Patricia H.*, 830 F. Supp. at 1297.

60. *See also Barrett*, 584 F. Supp. at 24 (harassment occurring in a car from which the plaintiff could not escape was deemed particularly severe).

61. *See also Hall*, 842 F.2d at 1015 (incidents of sexual harassment directed at other employees); *Hicks*, 833 F.2d at 1415–16 (same). *Cf. Midwest City-Del City Public Schools*, OCR Case No. 06–92–1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).

62. *See* note 17. In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. *Hicks*, 833 F.2d at 1416;

Jefferies v. *Harris Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (Title VII case).

63. In addition, even if there is no notice, schools may be liable for sexual harassment. *See* previous discussions of liability in situations involving *quid pro quo* harassment and hostile environment sexual harassment by employees in situations in which the employee acted with apparent authority or was aided in carrying out the harassment of students by his or her position of authority with the school.

64. *See Ellison* v. *Brady*, 924 F.2d 872, 881 (9th Cir. 1991), quoting *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1515–1516 (9th Cir. 1989) (Title VII cases); *Swentek* v. *USAir*, 830 F.2d 552, 558 (4th Cir. 1987), quoting *Katz* v. *Dole*, 709 F.2d at 255 (Title VII cases).

But see Rosa H. v. *San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997) and note 23. In *San Elizario*, the Fifth Circuit held, among other things, that liability for hostile environment harassment cannot attach if the school has only constructive notice of the harassment. *See* note 23.

65. Whether an employee is an agent or responsible school employee, or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student.

With respect to the notice provisions applicable to schools under Title IX, one Federal Circuit Court of Appeals decision, *Canutillo Indep. School Dist.* v. *Leija*, 101 F.3d 393, 398–400 (5th Cir. 1996), has held, contrary to OCR policy, that a school district was not liable in a case in which one of its teachers sexually molested a second grade student, because the student and her mother only reported the harassment to her homeroom teacher. Notwithstanding that a school handbook instructed students and parents to report complaints to the child's primary or homeroom teacher, the court held that notice must be given to "someone with authority to take remedial action." *See also Rosa H.* v. *San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997), and notes 23 and 64. In *San Elizario*, the Fifth Circuit held, among other things, that although the fifteen-year-old student, whose karate instructor had repeatedly initiated sexual intercourse, "was subject to discrimination on the basis of sex," a school district is only liable if an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Based on these and other decisions, Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. However, the existence of Fifth Circuit decisions that are inconsistent with OCR policy does not prohibit schools in these States from following the Guidance. In order to ensure students a safe and nondiscriminatory educational environment, it is the better practice for these schools to follow the Guidance. For example, the better practice is for schools to ensure that teachers and other personnel recognize and report sexual harassment of students to the appropriate school staff so that schools can take prompt corrective action and ensure a safe educational environment. In addition, the Guidance makes clear that providing students with several avenues to report sexual harassment is a very helpful means for addressing and preventing sexually harassing conduct in the first place. Schools in States in the Fifth Circuit should also consider whether State, local or other Federal laws may affect their responsibilities in this regard.

66. Racial Harassment Guidance, 59 FR 11450 (discussing how a school may receive notice).

67. *See Yates* v. *Avco Corp.*, 819 F.2d 630, 634–36 (6th Cir. 1987) (Title VII case); *Katz* v. *Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (same); *See also* Racial Harassment Investigative Guidance, 59 FR 11450.

68. *Cf. Katz*, 709 F.2d at 256 (the employer "should have been aware of the * * * problem both because of its pervasive character and because of Katz' specific complaints * * *"); *Smolsky* v. *Consolidated Rail Corp.*, 780 F. Supp. 283, 293 (E.D. Pa. 1991), *reconsideration denied*, 785 F. Supp. 71 (E.D. Pa. 1992) ("where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment" under Title VII); *Jensen* v. *Eveleth Taconite Co.*, 824 F. Supp. 847, 887 (D. Minn. 1993) (Title VII case; "[s]exual harassment * * * was so pervasive that an inference of knowledge arises * * *. The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert"); *Cummings* v. *Walsh Construction Co.*, 561 F. Supp. 872, 878 (S.D. Ga. 1983) ("* * * allegations not only of the [employee] registering her complaints with her foreman * * * but also that sexual harassment was so widespread that defendant had constructive notice of it" under Title VII); *but see Murray*, 57 F.3d at 250–51 (that other students knew of the conduct was not enough to charge the school with notice, particularly in case in which these students may not have been aware that the conduct was offensive or abusive).

69. Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

70. In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school's policies, it may be appropriate for the school to intervene without contacting the other students. It may still be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

71. *Cf. Bundy* v. *Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); *accord, Jones* v. *Flagship Int'l*, 793 F.2d 714, 719–720 (5th Cir. 1986) (employer should take prompt remedial action under Title VII). Racial Harassment Investigative Guidance, 59 FR 11450.

72. *Waltman* v. *Int'l Paper Co.*, 875 F.2d at 479 (appropriateness of employer's remedial action under Title VII will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps); *Dornhecker* v. *Malibu Grand Prix Corp.*, 828 F.2d 307, 309–10 (5th Cir. 1987) (Title VII case; employer arranged for victim to no longer work with alleged harasser).

73. *Intlekofer* v. *Turnage*, 973 F.2d 773 (9th Cir. 1992) (Title VII case) (holding that the employer's response was insufficient and that more severe disciplinary action was necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior).

74. Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. *See* 20 U.S.C. 1092(f).

75. *See* note 30.

76. University of California at Santa Cruz, OCR Case No. 09–93–2141 (extensive individual and group counseling); *Eden Prairie Schools, Dist. #272*, OCR Case No. 05–92–1174 (counseling).

77. Even if the harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community that harassment will not be tolerated. *Fuller* v. *City of Oakland*, 47 F.3d 1522, 1528–29 (9th Cir. 1995).

78. 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100.7(e). Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

79. *Tacoma School Dist. No. 10*, OCR Case No. 10–94–1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, school committed as part of corrective action plan to providing training for students); *Los Medanos College*, OCR Case No. 09–94–2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); *Sacramento City Unified School Dist.*, OCR Case No. 09–93–1063 (same as to workshops for management and administrative personnel, in-service training for non-management personnel).

80. In addition, if information about the incident is contained in an "education record" of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student's consent. *Id.* In evaluating whether FERPA would limit disclosure, the Department does not interpret

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FERPA to override any federally protected due process rights of a school employee accused of harassment.

81. 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies with the school district. At the postsecondary level, there may be a procedure for a particular campus or college, or for an entire university system.

82. *Fenton Community High School Dist. # 100*, OCR Case 05–92–1104.

83. While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

84. *See Vinson*, 477 U.S. at 72–73.

85. It is the Department's current position under the Family Educational Rights and Privacy Act (FERPA) that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student's education record unless—(1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. *See* note 80. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school's ability to inform the complainant of any disciplinary action taken.

86. The section in the Guidance on "Recipient's Response" provides examples of reasonable and appropriate corrective action.

87. 34 CFR 106.8(a).

88. *Id.*

89. *See Vinson*, 477 U.S. at 72–73.

90. *University of California, Santa Cruz*, OCR Case No. 09–93–2141; *Sonoma State University*, OCR Case No. 09–93–2131. This is true for formal as well as informal complaints. *See University of Maine at Machias*, OCR Case No. 01–94–6001 (school's new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student's or employee's individual file, but instead may be kept in a central confidential location.

91. For example, in *Cape Cod Community College*, OCR Case No. 01–93–2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.

92. Indeed, in *University of Maine at Machias*, OCR Case No. 01–94–6001, OCR found the school's procedures to be inadequate because only formal complaints were investigated. While a school isn't required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

93. *Academy School Dist. No. 20*, OCR Case No. 08–93–1023 (school's response determined to be insufficient in case in which it stopped its investigation after complaint filed with police); *Mills Public School Dist.*, OCR Case No. 01–93–1123 (not sufficient for school to wait until end of police investigation).

94. *Cf. EEOC* v. *Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir.) (Title VII case), *cert. denied*, 113 S.Ct. 299 (1992); *Johnson* v. *Palma*, 931 F.2d 203 (2nd Cir. 1991) (same).

95. The First Amendment applies to entities and individuals that are State actors. The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution. *See Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.

96. *See, e.g., George Mason University*, OCR Case No. 03–94–2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); *Portland School Dist. 1J*, OCR Case No. 10–94–1117 (reading teacher's choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

97. *See Iota Xi Chapter of Sigma Chi Fraternity* v. *George Mason University*, 993 F.2d 386 (4th Cir. 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

98. *See Florida Agricultural and Mechanical University*, OCR Case No. 04–92–2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student's viewpoint on white students on campus).

99. *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); *Cf. Cohen* v. *San Bernardino Valley College*, (college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy); *George Mason University*, OCR Case No. 03–94–2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment).

100. *See, e.g., University of Illinois*, OCR Case No. 05–94–2104 (fact that university's use of Native American symbols was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim under Title VI).

101. *See Vinson*, 477 U.S. at 67 (the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting *Henson*, 682 F.2d at 904; *cf. R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992) (citing with approval EEOC's sexual harassment guidelines).

102. *Compare Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986) (Court upheld discipline of high school student for making lewd speech to student assembly, noting that "[t]he undoubted freedom to advocate unpopular and controversial issues in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."), *with Iota XI* 993 F.2d 386 (holding that, notwithstanding a university's mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).

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The Role of the School Counselor in Confronting Peer Sexual Harassment

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Sexual harassment has received prominent attention as a social, political, and legal problem. In addition to a generally increased public awareness concerning sexual harassment and its impact on male-female relations (Smolowe, 1992), specific changes in workplace policies and practices related to gender relations are being implemented across the country. Within educational settings, concern about the impact of sexual harassment has intensified and, in particular, peer sexual harassment has surfaced as a critical issue in education (Russo, Nordin, & Leas, 1992; Sherman, 1993; Spaid, 1993). Although teachers, administrators, counselors, and other school staff have clearly been protected against unwelcome sexual advances (Marczely, 1993; Strauss, 1988; Wishnietsky, 1991), it has only been recently that the same standard has been applied to the behavior of peers in educational settings. The emerging scenario is that unless sexual harassment policies, training, and enforcement are in place, an educational institution may be held liable for unchecked student-to-student harassment (Perry, 1993; Wetherfield, 1990; Wickum, 1993). In response, the last 5 years have witnessed a flurry of policy and administrative actions by school officials in the area of peer harassment (Perry, 1993; Spaid, 1993).

School counselors are just now beginning to address the issue. Although the very few articles that have appeared in the professional literature to date have broadly established the basis for school counselor concern, close examination of the specific implications for the school counselor's work have been inadequately addressed. These implications include practical approaches for the school counselor's response to incidents of peer harassment. Yet, as school districts adopt sexual harassment policies, anecdotal evidence from the field indicates that school counselors are increasingly assigned responsibilities in the areas of prevention programs and interventions, and many have now begun looking for resources that will help them respond effectively. At the 1994 convention of the American Counseling Association (ACA), during a session on sexual harassment (Strauss, 1994), several participants noted that one of their most pressing problems related to the topic was knowing how to respond when a student reported being harassed (L. L. Rowell, personal communication, April 1994). Others, particularly secondary school counselors, noted an increase in the number of students coming to them to talk about being harassed. These counselors expressed a variety of needs about the topic of peer harassment, including how to investigate and follow through with allegations of harassment, how to prevent it, how to help students assert themselves, and how best to work with administrators and parents regarding peer sexual harassment.

Some counselors feel a strong commitment to preventing and countering harassment. Other counselors, already overwhelmed, may be concerned that peer sexual harassment education and intervention is another demand that they will not have the time to address adequately. Regardless of the counselor's attitude toward the issue, indications are that mounting pressure to do something will continue in the coming years. This article addresses three aspects of the situation currently faced by school counselors. First, sexual harassment is defined and an overview of evolving legal interpretations concerning peer harassment is presented. Second, the effects of peer sexual harassment on students is addressed and specific implications for the work of the school counselor are discussed. Third, resources and ideas school counselors can use to address peer harassment prevention and intervention within the context of developmental guidance and counseling are presented.

DEFINITION OF SEXUAL HARASSMENT

Definitions of *sexual harassment* vary (Fitzgerald, 1990). According to MacKinnon (1979), the lack of a common definition is understandable given that previously it was a problem that had no name. Indeed, the term was not used until the mid-1970s and sexual harassment was not recognized by the U.S. Supreme Court until 1986 (Siegel, 1991). Sexual harassment law is based on two federal acts: Title VII of the Civil Rights Act of 1964 and Title IX of the 1972 Educational Amendments (Marczely, 1993). Although a common definition is lacking, Equal Employment Opportunity Commission (EEOC) guidelines, written for implementing Title VII, provide an explicit statement used by many as a starting point for defining the term (Siegel, 1991; Strauss, 1992). According to the EEOC guidelines, sexual harassment consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to such conduct is made a term or condition of an individual's employment or academic advancement; (b) submission to or rejection of such conduct is used as the basis for employment decisions or academic decisions affecting the individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment (EEOC, 1986). In essence, sexual harassment is illegal because it has been defined as a form of sex discrimination.

The EEOC guidelines have been interpreted by the courts to include such different behaviors as assaults, leers, sexual innuendos, displays of sexually suggestive materials, and behavior that is nonsexual but still offensive (Wetherfield, 1990). Other behaviors that have been discussed in the context of public schools include touching, verbal comments, gestures, sexual pictures or notes, being cornered, and being pressured or forced to do something sexual (Stein, Marshall, & Tropp, 1993; Strauss, 1988). In recent years lower courts have

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Yet, in our view, this potential impact on school counseling needs to be viewed in context. For at least the past 30 years, concerns have been expressed regarding the overemphasis on a counselor-clinical services view of school counseling with its attendant tendency toward individual problems and crises (Gysbers & Henderson, 1994). Determined efforts to replace this orientation with a comprehensive developmental guidance and counseling model have been particularly evident in the past two decades. As Myrick (1993) described it, developmental guidance and counseling is predicated on a systematic response to students' needs for skills and experiences that enhance personal and interpersonal growth from one stage of development to another. With a systematic approach, needs are carefully assessed and programs are developed in response to the clearly identified needs.

We suggest that the benchmark for school counselor involvement with peer sexual harassment should be the extent to which the counselor's involvement reflects a programmatic response to students' needs identified within a developmental context. In this view, because the developmental approach emphasizes the importance of both interpersonal relationships and the school climates within which relationships develop and unfold (Myrick, 1993). Peer interactions that systematically devalue one group of students and that interfere with the attainment of healthy self-concepts by members of this group are likely to become high priority concerns for school counselors. Similarly, when needs surveys indicate student concern with school climates that condone peer harassment, counselors may have a key role in intervening to help create more supportive climates. With this developmental context in mind, counselors can respond to these student needs systematically and strategically by drawing on a variety of counseling program components. What follows is a discussion of specific ways that school counselors may be involved within the framework of comprehensive, developmental guidance.

RESPONDING WITHIN A DEVELOPMENTAL CONTEXT

Gysbers and Henderson (1994) presented a developmental guidance and counseling structure based on four program components: guidance curriculum, individual planning, responsive services, and system support. In our view, approaching the issue of peer sexual harassment within this framework provides a strategic focus for school counselors.

Guidance Curriculum

The curriculum component in this model addresses guidance-based knowledge, skills, and attitudes needed by all students. A clearly articulated guidance content is developed and is delivered to all students in a systematic way. Instruction is delivered through classroom presentations and structured group discussions. The key to this component in sexual harassment prevention is that the guidance content selected by a school or district includes material that explicitly addresses the elimination of harassment and the development of prosocial peer relations.

There are several models for classroom-based presentations on sexual harassment and most fit well within an overall guidance curriculum. For example, McGrath Systems has developed a comprehensive training program that includes three multimedia training packages (McGrath, 1993). The complete package includes six videos and accompanying printed materials with a three-part section for educators and staff, a two-part section for students, and a one-part section for family and community. *Sexual Harassment: Pay Attention!* is the section of the package pertaining to educating students. It is intended for classroom-based presentation and includes information about various aspects of sexual harassment such as definitions, examples, and how one can avoid being victimized. This package is designed for Grade 6 through college and encourages full discussion of the issue among peers.

Other curricula also have been developed for classroom use. For example, the Minnesota Department of Education (1993) recently published *Girls and Boys Getting Along*, a curriculum for K through Grade 3 and Grades 4 through 6. *Sexual Harassment and Teens: A Program for Positive Change* (Strauss, 1992) provides a curriculum for Grades 7 through 12. This program is intended for use in a variety of classes such as social science, cultural awareness, vocational education, or human sexuality and can be presented in three class periods. Although Strauss developed the curriculum assuming that the classroom teacher would have primary responsibility for teaching the units, she recommended team teaching the program and included counselors among possible teaching partners for the classroom teacher. Even if the counselor is not involved directly as a teaching partner in a classroom-based approach, after adequate in-service training and professional development, the counselor may serve as a consultant to all teachers directly involved with the program.

Anti-Bias Curriculum: Tools for Empowering Young Children (Derman-Sparks & the A.B.C. Task Force, 1989) and *Open Minds to Equality: A Sourcebook of Learning Activities to Promote Race, Sex, Class and Age Equity* (Schniedewind & Davidson, 1993) are two additional curricula. Both works address issues of power and privilege within a developmental context, with Derman-Sparks focused on preschool and kindergarten and Schniedewind and Davidson providing a sourcebook for elementary and middle school ages. These are examples of a proactive and prosocial approach. They have addressed peer sexual harassment by promoting interpersonal relationships and school climates based on equality and respect. Programs such as these endeavor to teach "the practice of freedom" (Freire, 1993, p. 15) and provide a foundation of skills for constructively addressing social issues such as violence, harassment, discrimination, and prejudice.

At the secondary level, some programs for preventing violence in schools have strong components related to sexism and peer sexual harassment. For example, Creighton and Kivel (1992) have offered a guidebook based on their "two-day, fifty-minute class curriculum on family and relationship violence prevention" (p. ix). In their view, peer sexual harassment reflects the broader social pattern of violence related to gender inequities. Their curriculum addresses a variety of power imbalances between "have" and "have not" groups and helps adolescents and adult helpers learn to talk together, to "face, resist, and stop the violence" (p. ix). Although the Creighton and Kivel approach has focused on a crucial social problem (i.e., violence) rather than on prosocial developmental tasks, the concise nature of the basic program, together with the emphasis on straight talk and the creation of strong alliances between youth and adults, makes it quite appealing for use in high schools, particularly inner-city schools.

The selection of a program for classroom guidance, whether focused on peer sexual harassment, antibias activities, equality, violence prevention, or assertiveness, is often a controversial enterprise. Paradoxically, within a democratic society, it may be controversial to talk about equality in other than broad patriotic terms. Counselors may need to be cautious when adopting or recommending materials for the populations they serve. Yet, that caution should not deter them from advocating for such curricula. Also, the current focus on school

district legal liability provides a strong rationale for the counselor engaged in, or considering such advocacy. Because of the potential controversy, we recommend pairing curriculum adoption with a process that involves educators, students, parents, and the larger community.

Individual Counselor Planning and Responsive Services

Counselor services, by design, provide students with activities to aid in personal, social, educational, and occupational development. In addition, they consist of activities to meet the immediate needs of students for counseling, consultation, referral, or information (Gysbers & Henderson, 1994). Therefore, both long-term life planning and immediate concerns are addressed. Planning for healthy personal and social development relates to peer sexual harassment in that an awareness of the rights of others leads to more responsible interpersonal behavior. Information and group activities pertaining to the prevention of peer sexual harassment are quite appropriate additions to the planning component of a developmental guidance and counseling structure. Responsive services, on the other hand, reflect the need for remediation and support for the victims of peer sexual harassment.

Both individual and group activities can be included in responsive services. For example, student support groups can be an effective way to provide support for students either in situations that lend themselves to harassment (such as female or male students in nontraditional classes) or for students who have experienced harassing behavior (Stein, 1993). In addition, classroom discussions can be used to help students intellectually process recent incidents. Small groups have been used in schools to provide a safe place for students to discuss feelings and become more aware of their behaviors (Mitchum, 1991; Page & Chandler, 1994). Group counseling can also be a vehicle to focus on behaviors that are unacceptable as well as strategies for dealing with harassing incidents. In addition, counselors can use group or classroom experiences to help students respond more assertively to sexual harassment. Teaching students their rights in interpersonal situations, along with training them in clear communication and assertiveness skills, is an essential component in confronting peer harassment (Stein & Sjostrom, 1994). In addition, training in mediation and conflict resolution may also prevent peer sexual harassment, by helping students treat each other more appropriately on the school grounds (Jacobson & Lombard, 1992).

An effective method for working with interpersonal situations in a group setting is role-playing. Role-playing has been used in classroom guidance programs to help students deal with family situations (Crosbie-Burnett & Pulvino, 1990). It can also be used to help students express feelings about having been harassed in the past and to teach them ways of responding to difficult situations (Mitchum, 1991; Stein & Sjostrom, 1994). By using role-playing, students can practice responding to harassers and reporting incidents of sexual harassment to parents and administrators. Role reversal techniques can help students experience what it is like to be on the receiving end of harassment. Other dramatic techniques can be used to help students with issues of tolerance, self-control, and social interaction (Beales & Zemel, 1990).

Students who have been traumatized by being the victims of sexual harassment may need specialized counseling services to deal with the ensuing damage to self-esteem, to their sexual identity, and for their feelings of anger, shame, and powerlessness (Hoteling, 1991). If time and training permit, the school counselor can offer services to meet this need. If, as is so often the case, the school counselor does not have the time or the training for working with serious reactions to trauma, then referrals to helping professionals in the community may be appropriate (Johnson, 1989). The school counselor needs to develop a network of referral sources that specialize in dealing with sexual victimization and trauma.

System Support

The fourth component of the Gysbers and Henderson (1994) model is system support. This involves the management and support activities needed to maintain a comprehensive program. In relationship to peer sexual harassment, probably the single most important step for districts and schools to take is to have a policy on sexual harassment and for the school administration to support this policy (Stein et al., 1993; Stein & Sjostrom, 1994). This step is at the foundation of a school's response to peer sexual harassment and is the best protection for school personnel in dealing with the issue. In our view, a strong policy on peer sexual harassment should be built into the comprehensive guidance program and should be given strong support at all levels of guidance and counseling administration.

Indeed, in the *Seventeen* magazine survey (LeBlanc, 1993), the single most common recommendation for what schools should do about sexual harassment is to adopt and enforce schoolwide policies (Stein et al., 1993). In this context, the school counselor's initial involvement with the issue of peer sexual harassment may be as an advocate for the development of a sexual harassment policy. The National Council for Research on Women (Budhos, 1994) has outlined 12 key elements of a good sexual harassment policy. In addition to serving as a signpost for policy development, those elements also provide direction for school counselor involvement when a policy is adopted. For example, the complaint procedure may involve the counselor and the policy needs to specify support services provided by nurses, counselors, psychologists, and social workers to students who have been harassed.

In addition, a good policy spells out the sexual harassment education and training in which all students, teachers, and staff will participate, and the counselor may be an important resource for professional development workshops and seminars on sexual harassment prevention (Stein, 1993; Strauss, 1992). In-service training on this issue may involve the school counselor in a central way. For example, Strauss (1988) suggested that teachers have the opportunity to clarify their own values and attitudes concerning sexual harassment, and school counselor involvement in this effort will be important. According to Stein (1993), training should address the following knowledge and competency areas: (a) the definition of sexual harassment and the recent court cases and laws that have formed the definition, (b) a school or district policy with clear statements concerning how to handle a sexual harassment complaint, (c) discussion and clarification of individual concerns and misunderstandings about sexual harassment, and (d) recommendations for education and prevention.

Ultimately, the attention the issue is now receiving provides an opportunity for counselors to advocate for school curricula infused not only with harassment prevention, but also with respect and courage as well (Goodman, 1993; Stein, 1993). For now, however, policy development and training are the minimum efforts needed to begin addressing the issue. With the attention that peer sexual harassment is now receiving, it will be increasingly difficult for school districts to avoid developing a policy and providing their professional staffs with in-service training on sexual harassment. The counselor can be an advocate for both policy and training issues

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through counseling departments, unions, and professional associations.

CONCLUSION

In the coming years, all indications are that the school counselor will be increasingly expected to play a key role in the school's response to sexual harassment. One important question regarding this expectation is whether counselor involvement will develop within the framework of comprehensive guidance and counseling or whether it will be assigned as one more responsibility in the overwhelming list of things school counselors are expected to do. We believe the best approach to school counselor involvement in peer sexual harassment is a systemic and systematic one. In this article we have suggested a structure for helping to ensure that the school counselor's involvement fits within the comprehensive guidance and counseling model. The framework we offered has three perspectives: advocacy, prevention, and remediation. We wish to make it clear, however, that the activities we have included are not necessarily sequential; that is, not all of the activities in advocacy have to be completed before preventative or remedial activities are initiated. School counselors often have to deal with emergency or crisis situations that may occur at any time while the tasks of advocacy are still in process.

RECOMMENDATIONS

Although sexual harassment can generate a strong sense of urgency among counselors, our recommendation is that counselors respond as much as possible in a planful and systematic way. When the issue of defining the context of the counselor's involvement is not explicitly addressed, damage is done to the effort to create a solid professional identity for school counseling. In other words, if school counselors are expected to spearhead the educational system's response to every crisis that requires additional programs (often because of legal mandates), then every step forward in professionalization, accreditation, standards, and role definition will be accompanied by two steps back. Indeed, it sometimes seems that the school counselor is put in a position of waiting for the most recent social issue to surface on the latest talk shows—such as Geraldo Rivera's or Oprah Winfrey's—before being able to take a proactive stance. This phenomenon contributes to the tendency to design intervention and remediation packages that resemble 30-second spots on radio and television. Our concern is that every effort must be made to avoid addressing sexual harassment in a way that waters down the significance of the issue, and we believe that reducing the focus on prevention efforts to bland, feel-good statements will only continue to mask the problem. A counseling and guidance orientation that combines a developmental perspective with a keen awareness of current social problems can help guard against school counselor involvement being made trivial or minimal, and thus promote professional school counselor identity.

A related issue is the controversy surrounding the school's role in addressing crucial social issues. An example is the anger of some religious groups toward affective education. (As a school counselor in a large, city school district explained to one of us, "I can't even introduce classroom guidance exercises which require that students close their eyes.") One way of lessening the likelihood of rancorous confrontations is to adopt guidance and counseling curricula based on a larger picture of child and adolescent development. For example, focusing on goals for social-personal growth, such as gaining self-awareness, making healthy choices, respecting others, developing relationship skills, resolving conflicts, and making effective decisions, may both address crucial elements of sexual harassment prevention as well as provide a broad framework of prosocial values that can be supported by parents and others in the larger community (American School Counselor Association, 1990). Schools should also recognize that social skills development and healthy school climates require long-term planning and continual support and nurturance. Unless a school can make the necessary commitment of time and resources to thoroughly develop a systematic approach to the problem of peer sexual harassment, the results will, at best, be spotty and haphazard.

An additional concern is that of false accusations of sexual harassment which, although rare, may occur in the school setting. Indeed, the effects of false accusation can be as devastating as those of sexual harassment (Brass, 1992). Counselors need to keep an open mind and to use their professional judgment and intuition when dealing with the possibility that a student or teacher is being falsely accused (Berliner & Loftus, 1992). Encouraging the victim of peer sexual harassment to confront the harasser before initiating formal complaint procedures might help alleviate this problem. If students know they will be held accountable for confronting alleged harassers, they may be discouraged from using the accusation as a form of retaliation for personal slights or relationship problems. At the very least, a clear statement defining false accusation and describing the consequences for it should be included in the policy of the school or the district. Schools have two major obligations in addressing the problem of peer sexual harassment. The first is specific: that is, to ensure that a school is meeting its legal obligations to provide a safe and secure environment. The second obligation is more general and, perhaps, philosophical. It involves not only promoting achievement while ensuring a safe and secure environment (Anderson, 1982; Gilmartin, 1987; Olweus, 1978), but also promoting values that prepare children and youth to live as empowered individuals in a democratic society. As educational researchers continue to explore and define more closely the linkages and interactions among school climate, violence prevention, achievement, equity, and self-esteem, a more systemic perspective on peer harassment is likely to emerge and may be incorporated into larger educational reform efforts. For now, however, because many school districts perceive a strong need for immediate action and because the school counselor is often best situated to provide services in the context of prevention, remediation, and advocacy, the counselor may be called on to respond quickly to the increasing flurry of policy and administrative actions by school officials. The best counsel that can be provided about the demand for school counselor services in the area of peer harassment is for the counselor to become informed and proactive.

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